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IN THE

Supreme Court of the United States

October Term, 1936

No. 436

IN THE MATTER
of
UNITED CIGAR STORES COMPANY OF AMERICA
Debtor

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*
Petitioners

IRVING TRUST COMPANY, as Trustee, UNITED CIGAR STORES COMPANY OF AMERICA, LANDLORDS' PROTECTIVE COMMITTEE, PREFERRED STOCKHOLDERS' PROTECTIVE COMMITTEE, DEBENTURE HOLDERS' PROTECTIVE COMMITTEE, JACOB RUPPERT REALTY CORPORATION and UNITED STORES CORPORATION
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONERS

SUSAN BRANDEIS
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Of Counsel

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Statement

The brief for the Trustee, respondent, in its final form as filed herein, was not served upon us until the very day

that counsel left for Washington to argue this cause; and, indeed, the brief was delivered to counsel only at the train.

Consequently, there has not been time heretofore to prepare a reply brief.

Scope of Argument

In footnote 2 at page 5 of the Trustee's brief, it is stated that in five of our cases "no rejection ever occurred". At page 11 of the Trustee's brief, it is stated that in five of our cases the leases were rejected by the Trustee. The Trustee's reference is to formal, express notices of rejection. We deem the Record to be clear upon the point that such formal notices of rejection were given in five of our cases; but we believe, further, that whether the correct number is four or five is immaterial, because our position (to which point alone this reply brief addresses itself) is as follows:

> *That there is no distinction of substance between the five claims in which formal notice of rejection was given by the Trustee, and the four cases in which such formal notice was not given.*

Argument

In bankruptcy, rejection by the Trustee of an unexpired lease is merely a refusal by the Trustee to assume the same.

The only choice which the bankruptcy Trustee has in respect of an unexpired lease is to elect whether or not

he will assume it; and if the Trustee elects not to assume an unexpired lease, he has thereby rejected it.

Rejection of a lease is an actuality, and either occurs or does not occur. The test is one of fact—whether the Trustee has assumed the lease or has not assumed it. Giving notice of rejection adds nothing to the fact; and the absence of notice of rejection detracts nothing from the fact.

In all of our claims, there had been rejection of the leases *in fact*.

Certainly the Trustee will not take the position that any of our leases were assumed by it. The Record shows that the Trustee made it known to all landlords, by circular letter dated as early as September 22, 1932, that it would be obliged to reject burdensome leases (Trustee's Ex. A, R. 4-5). This was followed by further notice to the same effect under date October 6, 1932 (Trustee's Ex. B, R. 6-9).

The Trustee's foregoing communications were followed by its circular letter of November, 1932 (Trustee's Ex. C, R. 9-11). By that time, the Trustee had clearly decided upon refusal to assume our leases. Indeed, none of the agreements in our cases was signed by *any* party thereto before November 15; none of these agreements was completely executed before the end of November, 1932; seven of our nine agreements were not executed until December, 1932; and one of our agreements was not executed until January 16, 1933.*

In negotiating with our landlords for the assignment agreements, the Trustee was obviously taking the position

* At page 6 of our Main Brief, in the text and in footnote d we have given, by inadvertence, the dates *as of* which these agreements are executed. In point of fact, as appears from the acknowledgments, the agreements were not executed until the later dates set forth above.

that our leases were leases which it had elected not to assume; else there would have been no occasion for the negotiations or for making the agreements. It could only have been upon the basis of *rejection in fact* that the agreements were made at all.

Concededly, the agreements are the Trustee's writings. They show, upon their face, that the Trustee itself considered that the leases which were the subject of these agreements had been rejected by it, without regard to whether formal notice of rejection had been sent out in any particular case or not; for upon the face of each of the very agreements as to which the Trustee says there were no rejections, in the last paragraph thereof, the Trustee particularly and explicitly stipulates as follows:

> "The Landlord and the Bankrupt hereby jointly and severally covenant and agree that Irving Trust Company, by executing this Assignment Agreement, * * * *does not assume the Lease or any agreement of sublease or any responsibility therefor or otherwise.*"*

There is thus no difference in substance or in legal effect between those of our cases in which formal notices of rejection were sent out, and those of our cases in which such notices were not sent out. At the date of each of our agreements, the Trustee had made its election between the only alternatives open to it, namely, whether to assume or not to assume the leases. In each of our cases, the Trustee had chosen to reject, and by its own agreements the Trustee was safeguarding itself against impairing the effectiveness of the elections thus made by it.

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* The typographical emphasis is ours. The quotation is taken from R. 44, and the same language will be found in the other four agreements with respect to which there had been no express rejections—R. 154, 179-80, 229.

It should be added that the listing at R. 321, of leases rejected and not rejected by the Trustee, has to do only with the question whether or not formal notice was sent out; it does not deal with the substance.

Conclusion

The judgment of the Circuit Court of Appeals should be reversed as to all nine of the claims in our case.

Respectfully submitted,

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